UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ALASKA AIRLINES, INC., Plaintiff and Counter Defendant, v. ENDURANCE AMERICAN INSURANCE CO., Defendant and Counterclaimant.	C20-1444 TSZ ORDER

THIS MATTER comes before the Court on the Motion for Partial Summary Judgment ("MPSJ"), docket no. 45, filed by Alaska Airlines, Inc. ("Alaska Airlines") and the Cross-MPSJ, docket no. 65, filed by Endurance American Insurance Company ("Endurance"). Endurance has also filed three motions, docket nos. 78, 83, and 96, to exclude and/or strike the expert testimony and declarations of David Beyer. Having reviewed all papers filed in support of, and in opposition to, the motions, the Court enters the following Order.

Background

In this matter, Alaska Airlines and Endurance assert claims against each other related to an insurance policy (the "Endurance Policy") issued to Huntleigh USA Corporation ("Huntleigh"). In 2007, Alaska Airlines and Huntleigh entered into a

Service Agreement pursuant to which Huntleigh provided wheelchair escort services to Alaska Airlines passengers at the Portland International Airport ("PDX"). Service Agreement, Ex. 1 to Newsom Decl. (docket no. 31-1 at 1). On June 7, 2017, Bernice Kekona, who required wheelchair assistance, arrived in Portland, Oregon on an Alaska Airlines flight from Maui, Hawaii. When Kekona attempted on her own to find the gate for her connecting flight to Spokane, Washington, she fell down an escalator in her wheelchair and sustained several injuries, from which she later died.

Prior to Kekona's death, Alaska Airlines was presented with a claim for the injuries she sustained. As a result, on August 18, 2017, United States Aircraft Insurance Group ("USAIG"), the liability insurance representative for Alaska Airlines, sent a letter to Huntleigh. Ex. 1 to Fetters Decl. (docket no. 39-1 at 1–7). The letter referenced the Service Agreement and tendered the claim for Kekona's injuries (the "Kekona Claim") to Huntleigh and its insurer "for handling, defense, and indemnification on behalf of" Alaska Airlines. Id. (docket no. 39-1 at 3). The tender letter also summarized the Kekona Claim and identified the two Huntleigh employees that had assisted Kekona at PDX. Id. (docket no. 39-1 at 2). The tender letter then referred to § 6 of the Service Agreement, which was an indemnification provision that provided as follows:

> "To the fullest extent permitted by law, Contractor [Huntleigh] shall indemnify, defend and hold harmless Alaska Airlines, its directors, officers, employees and agents from and against any and all claims, damages, losses, fines, civil penalties, liabilities, judgments, costs and expenses of any kind or nature whatsoever, including, but not limited to, interest, court costs and attorney's fees, which in any way arise out of or result from any act(s) or omission(s) by Contractor (or anyone directly or indirectly employed by Contractor or anyone for whose acts Contractor may be liable) in the

> performance or nonperformance of services under [this] Agreement, including but not limited to:
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> Death of or injury to any person or persons; . . . ."

Id. (docket no. 39-1 at 3). The tender letter further cited § 5 of the Service Agreement, which required Huntleigh to provide insurance covering its operations pursuant to the Service Agreement, and indicated that Alaska Airlines had been named as an "additional insured" on a general liability policy issued to Huntleigh by Everest Indemnity Insurance Company ("Everest").[1] Id.; see also Certif. of Liab. Ins. (docket no. 39-1 at 5). In sum, Alaska Airlines, through USAIG, tendered the Kekona Claim to Huntleigh and its insurer based on *both* the Service Agreement and the status of Alaska Airlines as an additional insured on the policy Huntleigh was contractually required to obtain.

Kekona's attorneys sent a demand letter dated August 25, 2017, to USAIG and Kern Wooley, P.C. ("Kern Wooley"), a law firm that administered claims tendered to Huntleigh's insurer (Endurance), requesting mediation and attaching a draft complaint. Ex. 3 to Fetters Decl. (docket no. 39-1 at 11–32). According to the *draft* complaint, which was captioned for commencement in Spokane County Superior Court, but was never filed, although Kekona was supposed to receive gate-to-gate escort services at PDX, she was assisted only to the outside of the arriving airplane's door and was then left

[1] Alaska Airlines and USAIG later learned that Everest was not Huntleigh's liability insurer; rather Huntleigh was insured by Endurance. As explained in more detail below, at the time USAIG sent the tender letter, neither it nor Alaska Airlines had a copy of the Endurance Policy. In fact, Alaska Airlines did not receive a copy of the Endurance Policy until 2019, when it was disclosed in connection with the arbitration between it and Huntleigh.

to find her own way to her connecting flight, after which she became confused and sustained serious injuries. Id. at ¶¶ 44–46 & 48–49. The *draft* complaint did *not* name Huntleigh as a defendant, and it incorrectly stated that an Alaska Airlines employee, rather than a Huntleigh employee, met Kekona on the plane and transferred her to her wheelchair. Id. at ¶¶ 2, 3, & 42.

Kern Wooley sent a letter to USAIG dated September 13, 2017, confirming receipt of the demand letter and *draft* complaint, but denying USAIG's tender of the Kekona Claim. Ex. 4 to Fetters Decl. (docket no. 39-1 at 34–36). The denial letter indicated that, although Kern Wooley's investigation was ongoing, the firm did "not have any information that supports that [Kekona's] claim arises out of 'any act(s) or omission(s)' by Huntleigh." Id. (docket no. 39-1 at 34–35). Although Kern Wooley acknowledged that two Huntleigh agents assisted Kekona, the firm asserted that "the agents inquired on multiple occasions whether Ms. Kekona required any further assistance to which she declined." Id. (docket no. 39-1 at 35). The denial letter further represented that Kern Wooley had "no information that Alaska Airlines informed Huntleigh of [the] requested [gate-to-gate] service," and opined that "any failure to provide escort service appears to be the fault of Alaska Airlines." Id. (docket no. 39-1 at 35–36). Kern Wooley did, however, indicate that Endurance's parent company would consider mediation:

> Accordingly, Sompo[2] would not be opposed to an agreement to mediate with the express understanding that it does so in mutual agreement and in

[2] In this tender-denial letter, Kern Wooley introduced itself as "administering the [Kekona Claim] on behalf of . . . Endurance American Insurance Co., a member of Sompo International." Ex. 4 to Fetters

> coordination with Alaska Airlines and USAIG, that any contribution to a settlement by the parties would be on an individual basis without right to seek contribution, and without any waiver of rights with respect to the tender if mediation is unsuccessful.

Id. (docket no. 39-1 at 36).

By letter dated October 16, 2017, the firm of Mills Meyers Swartling P.S. ("Mills Meyers") requested, on behalf of Alaska Airlines and USAIG, that "Huntleigh and its insurers promptly accept Alaska's tender of defense" as to the Kekona Claim. Ex. 5 to Fetters Decl. (docket no. 39-1 at 42). The letter informed Kern Wooley that, although the *draft* complaint "refers to the wheelchair agents as Alaska [Airlines] employees, the wheelchair agents who assisted Ms. Kekona . . . were actually employed by Huntleigh and were providing 'Wheelchair Escort Services' to Ms. Kekona pursuant to Huntleigh's Service Agreement . . . with Alaska [Airlines]."[3] Id. (docket no. 39-1 at 39).

Kekona died on September 20, 2017. In December 2017, Kekona's estate filed a survival and wrongful death action against Alaska Airlines, its parent company (Alaska

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Decl. (docket no. 39-1 at 34). Thus, the tender-denial letter is understood as conveying the position of both Sompo and Endurance.

[3] In a footnote in this tender letter, Mills Meyers sought clarification concerning the relationship between Everest and Endurance, and asked whether Huntleigh was insured under separate policies by both Everest and Endurance or whether Kern Wooley's prior reference to Endurance was in error. Ex. 5 to Fetters Decl. (docket no. 39-1 at 38 n.1). On behalf of Alaska Airlines and USAIG, Mills Meyers indicated that "[t]he renewed tender and demand for defense and indemnification on behalf of Alaska [Airlines] in this letter is intended to be effective with respect to Huntleigh and its applicable liability insurer, whether that insurer be Endurance or otherwise." Id. Thus, although Alaska Airlines did not yet have the Endurance Policy, it was clearly making its tender under any insurance that Huntleigh had, and on which Alaska Airlines was an additional insured, which included the Endurance Policy.

Air Group, Inc.), and Huntleigh[4] in King County Superior Court ("Kekona Lawsuit"). See Kekona Compl., Ex. A to Fetters Decl. (docket no. 28). Importantly, in naming both Alaska Airlines and Huntleigh as defendants, the complaint alleged that both "Alaska Airlines and Huntleigh were negligent" and that they "were acting in concert and therefore are jointly and severally liable to Plaintiff." Id. at ¶¶ 139 & 143.

In August 2018, Mills Meyers sent another letter, this time on behalf of Alaska Airlines and Alaska Air Group, Inc., requesting that "Huntleigh and its insurers promptly accept this renewed tender for defense and indemnity" as to the Kekona Claim. Ex. B to Fetters Decl. (docket no. 28 at 28 & 30). The tender letter asserted as follows:

> [Huntleigh's] denial of [our previous] tenders constitutes a material breach of contract. We ask that Huntleigh promptly reverse its decision and accept Alaska's tender of defense and indemnity. If Huntleigh refuses to accept Alaska's tender, Alaska will initiate an AAA arbitration against Huntleigh for declaratory relief and breach of contract.

Id. (docket no. 28 at 28). The tender letter also explained why counsel for Alaska Airlines and Alaska Air Group, Inc. believed the Kekona Lawsuit had triggered the duty to defend:

> Here, the [Service] Agreement requires Huntleigh to defend and indemnify Alaska [Airlines] for claims that "in any way arise out of or result from any act(s) or omission(s) by Contractor . . . in the performance or nonperformance of services under this Agreement." The Complaint alleges that Huntleigh's employees "abandoned" Mrs. Kekona and did not escort her to the gate for her connecting flight to Spokane, and that Mrs. Kekona was "forced to find her own gate without the required escort." The Complaint alleges "it was the duty and responsibility of Defendant Huntleigh, as

[4] Huntleigh was later dismissed from the Kekona Lawsuit, which was removed from King County Superior Court to this District, for lack of personal jurisdiction. Estate of Kekona v. Alaska Airlines, Inc., No. C18-116-JCC, 2018 WL 1737968 (W.D. Wash. Apr. 11, 2018).

> Defendant Alaska Airlines' agent, to provide gate-to-gate escort service to [Kekona]," and "upon [Kekona's] arrival, Defendant Huntleigh breached its duty by failing to provide [Kekona] the required gate-to-gate escort," and "[Kekona] sustained fatal injuries as a direct and proximate result of Defendant Huntleigh's acts and omissions." The Complaint also alleges causes of action against Huntleigh for allegedly failing to adequately train and supervise its own employees. Although the Alaska Airlines Defendants deny Plaintiff's allegations and believe that none of the defendants are at fault, Plaintiff's allegations are sufficient to trigger Huntleigh's duty to defend under the Agreement and Oregon law.
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> Plaintiff's allegations do not involve a request for indemnity for loss "caused solely by the acts or omissions of Alaska [Airlines]," because the Complaint alleges independent acts of negligence against Huntleigh for which Plaintiff seeks to impose joint liability upon the Alaska Airlines Defendants. In addition, the allegation that "Huntleigh alleges Alaska Airlines failed to communicate to Huntleigh that [Kekona] required the gate-to-gate assistance, is irrelevant for purposes of Huntleigh's contractual defense and indemnity obligations.

Id. (docket no. 28 at 30) (citations and footnote omitted).

By letter dated October 18, 2018, Kern Wooley again denied Alaska Airlines' tender. Ex. C to Fetters Decl. (docket no. 28 at 42–43). Kern Wooley reasoned that Huntleigh was asked to provide and offered only "aisle chair service" to Kekona, that the firm had "received no evidence to establish that . . . Huntleigh was engaged or should have been engaged in a wheelchair operation . . . in accordance with the Wheelchair Service Agreement," and "the accident, which is the subject of the Kekona Lawsuit, did not arise out of the performance or nonperformance of Huntleigh under the Agreement." Id.

On February 19, 2020, counsel for Alaska Airlines and Alaska Air Group, Inc., who had switched law firms and was then practicing with Stokes Lawrence, P.S. ("Stokes Lawrence"), and who had received the Endurance Policy during the arbitration process

with Huntleigh, sent yet another tender letter, this time directly to Endurance, at two different addresses in New York and via The Corporation Trust Company and Paracorp Incorporated. Ex. E to Fetters Decl. (docket no. 28 at 123–29). As indicated in the letter from Stokes Lawrence, the Endurance Policy contained an endorsement, which included as an Additional Insured any person or organization on whose behalf Huntleigh performed operations and to whom Huntleigh provided a service. Id. (docket no. 28 at 124); see Endurance Policy, Ex. D to Fetters Decl. (docket no. 28 at 90). The Endurance Policy does not contain a choice-of-law provision.

Sompo International Insurance ("Sompo"), acting on Endurance's behalf, denied this tender by letter dated April 13, 2020, "for all the reasons previously set forth," and stated that "it has always been undisputed that Huntleigh was not engaged by Alaska [Airlines] to perform wheelchair services operations on behalf of Alaska Airlines for [Kekona's] benefit." Ex. F to Fetters Decl. (docket no. 28 at 131). The letter was signed by the same attorney at Kern Wooley who had authored the prior correspondence denying tenders by Alaska Airlines, Alaska Air Group, Inc., and/or USAIG. Importantly, the April 13, 2020, denial letter acknowledged that Alaska Airlines had previously tendered the Kekona Claim and Kekona Lawsuit under *both* the Service Agreement and as an additional insured on the Endurance Policy:

> [T]his claim and lawsuit have been tendered previously to Huntleigh and its insurer by Alaska [Airlines] as respects a Services Agreement between Huntleigh and Alaska [Airlines] and as respects Alaska [Airlines'] purported status as an additional insured on Huntleigh's policy. Sompo has responded previously to Alaska [Airlines] by letters dated September 13, 2017, and October 18, 2018.

Id.

In September 2020, Alaska Airlines filed this action against Endurance alleging breach of contract, bad faith, and violations of Washington's Insurance Fair Conduct Act ("IFCA") and Consumer Protection Act ("CPA"). Compl. (docket no. 1 at 20–23). In March 2021, Endurance filed its Answer, Counterclaim, and Third-Party Complaint, impleading USAIG and related entities,[5] and asserting claims for declaratory judgment, contribution, and subrogation. Answer (docket no. 11 at 21 & 35–40).

In June 2021, Alaska Airlines filed a Motion for Partial Summary Judgment on the issue of whether Endurance breached its duty to defend. Alaska Airlines MPSJ (docket no. 27). In its response and cross-motion, docket no. 30, Endurance did not contest that its obligation to defend Alaska Airlines had been triggered, and the Court concluded that Endurance had breached its duty to defend. Order at 7–9 (docket no. 44). The Court further determined that Washington law applied to the non-contractual claims. Id. at 10–14.

Alaska Airlines now moves for partial summary judgment on liability, asserting that Endurance's breach of its duty to defend was in bad faith and that Endurance violated IFCA and the CPA. Alaska Airlines also asks the Court to rule that estopping Endurance from denying coverage is an appropriate remedy for its breach. In connection with Alaska Airlines' motion for partial summary judgment on its extra-contractual

[5] The Court has declined to exercise supplemental jurisdiction over Endurance's third-party claims against USAIG and related entities, and those claims have been dismissed without prejudice. See Order at 15–16 (docket no. 44).

claims, it seeks damages for alleged increases in insurance premiums, the fees and costs incurred in the Huntleigh arbitration, and other costs associated with Alaska Airlines' management of the underlying Kekona Lawsuit. See Reply at 11 (docket no. 72). Alaska Airlines estimates that the total amount of extra-contractual damages exceed $5 million. Endurance cross-moves for partial summary judgment, arguing that Alaska Airlines cannot meet its burden to prove essential elements of its extra-contractual claims. Endurance further asks the Court to exclude the testimony of Alaska Airlines' expert witness David Beyer.

Discussion

I. Summary Judgment Standard

The Court shall grant summary judgment if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). A fact is material if it might affect the outcome of the suit under the governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). To survive a motion for summary judgment, the adverse party must present affirmative evidence, which "is to be believed" and from which all "justifiable inferences" are to be favorably drawn. Id. at 255, 257. When the record, however, taken as a whole, could not lead a rational trier of fact to find for the non-moving party, summary judgment is warranted. See Beard v. Banks, 548 U.S. 521, 529 (2006) ("Rule 56 'mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to

establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'" (quoting Celotex, 477 U.S. at 322)).

II. Bad Faith

Alaska Airlines contends that Endurance's denials of the tenders of the Kekona Claim and Kekona Lawsuit constituted bad faith as a matter of law. The Court agrees. "An insurer acts in bad faith if its breach of the duty to defend was unreasonable, frivolous, or unfounded." Am. Best Food, Inc. v. Alea London, Ltd., 168 Wn.2d 398, 412, 229 P.3d 693 (2010). The duty to defend is broader than the duty to indemnify, and it "arises when a complaint against the insured, construed liberally, alleges facts which could, if proven, impose liability upon the insured within the policy's coverage." Truck Ins. Exch. v. Vanport Homes, Inc., 147 Wn.2d 751, 760, 58 P.3d 276 (2002). In Washington, after a tender is made, "[t]he duty to defend generally is determined from the 'eight corners' of the insurance contract and the underlying complaint."[6] Expedia, Inc. v. Steadfast Ins. Co., 180 Wn.2d 793, 803, 329 P.3d 59 (2014). The insurer must give the insured the benefit of the doubt when determining whether the insurance policy covers the allegations in the complaint. Id. Courts consider whether the denial of coverage was unreasonable when it occurred, and not whether later developments could have vindicated the insurer's decision. Fireman's Fund Ins. Cos. v. Alaskan Pride P'ship, 106 F.3d 1465, 1470 (9th Cir. 1997). An insured need not prove that the insurer acted

[6] Washington has two exceptions to the "eight corners" rule, both of which favor the insured, see Expedia, 180 Wn.2d at 803, and neither of which are asserted or apply in this case.

dishonestly or intended to act in bad faith. Moratti ex rel. Tarutis v. Farmers Ins. Co. of Wash., 162 Wn. App. 495, 506, 254 P.3d 939 (2011). Only "a reasonable basis for denial of an insured's claim constitutes a complete defense to any claim that the insurer acted in bad faith." Dombrosky v. Farmers Ins. Co. of Wash., 84 Wn. App. 245, 260, 928 P.2d 1127 (1996).

Endurance's denials were not premised on reasonable grounds. Although Endurance repeatedly justified its tender denials by saying that Kekona's injuries did not arise from the acts or omissions of Huntleigh, this proposition is directly contradicted by the allegations in the complaint filed in the Kekona Lawsuit and the recitations of facts set forth in the tender letters. The complaint in the Kekona Lawsuit alleged that, as Alaska Airlines' agent, Huntleigh had the duty to provide Kekona with gate-to-gate escort service, Huntleigh breached its duty by failing to provide such service, and that Kekona "sustained fatal injuries as a direct and proximate result of Defendant Huntleigh's acts and omissions." Kekona Compl. at ¶¶ 134, 135, & 137 (docket no. 28 at 22–23). Indeed, in its answer to the complaint in this lawsuit, Endurance acknowledged that "Kekona's estate disputes that she declined further assistance and maintains that the Alaska [Airlines] and Huntleigh employees left Ms. Kekona to navigate the airport herself." Answer at ¶ 3.10 (docket no. 11). Each tender letter explained that Kekona was asserting a failure to provide the requested gate-to-gate service and contesting any assertion that she declined help to get to her connecting flight. See Ex. 1 to Fetters Decl. (docket no. 39-1 at 2) ("Counsel for Mrs. Kekona alleges that she did not decline additional assistance and was left to navigate the airport on her own, which ultimately

caused her to become confused, leading to her unfortunate accident."); Ex. 5 to Fetters Decl. (docket no. 39-1 at 39) (citing the second *draft* complaint attached thereto); Ex. B to Fetters Decl. (docket no. 28 at 30) ("The Complaint alleges that Huntleigh's employees 'abandoned' Mrs. Kekona and did not escort her to the gate for her connecting flight . . . ."); Ex. E to Fetters Decl. (docket no. 28 at 125). Given the allegations known to Endurance at the time of its denials, which made clear that the Kekona Claim and the Kekona Lawsuit involved injuries allegedly arising from the acts or omissions of Huntleigh, no reasonable interpretation within the "eight corners" of the Endurance Policy and the anticipated or operative pleading supported a view that the duty to defend was not owed to Alaska Airlines, as an additional insured.

Although the Court later determined that Washington law applies, Endurance asserts that its reliance on Oregon law to conclude that Alaska Airlines was not an additional insured was reasonable. In refusing to tender a defense, however, Endurance (or those communicating on its behalf) never cited to Oregon law. See Ex. 4 to Fetters Decl. (docket no. 39-1 at 34–36); Ex. C to Fetters Decl. (docket no. 28 at 42–43); Ex. F to Fetters Decl. (docket no. 28 at 131).[7] The Court will nevertheless address the merits of Endurance's contentions under Fred Shearer & Sons, Inc. v. Gemini Insurance Co. ("Shearer"), 237 Or. App. 468, 240 P.3d 67 (2010), which held that, when determining whether a party seeking coverage constitutes an insured within the meaning of the policy,

[7] Endurance's denial letters instead gave factual explanations and opined that Huntleigh was not engaged by Alaska Airlines to perform wheelchair services operations.

courts may look outside the complaint. Id. at 476–77. Endurance argues that, because the Service Agreement had an Oregon choice-of-law provision, it reasonably applied Oregon law when considering the tenders from Alaska Airlines. This reasoning does not establish that the denial of coverage was reasonable.

Even if Oregon law governed this insurance dispute, the Shearer standard applies only when an entity's status as an insured cannot be determined from the face of the complaint and the policy. See Clarendon Am. Ins. Co. v. State Farm Fire & Cas. Co., No. 3:11-CV-01344, 2013 WL 54032, at *6 (D. Ore. Jan. 3, 2013); see also W. Hills Dev. Co. v. Chartis Claims, Inc., 360 Or. 650, 666, 385 P.3d 1053 (2016) (distinguishing Shearer, which involved an "open class of 'additional insureds," defined "entirely by the relationship between the otherwise unidentified class members and the named insured, and the situation of West Hills Development Company, which was "designated by name" as an additional insured). Here, to the extent information outside the complaint and the policy was needed to ascertain whether Alaska Airlines was an additional insured, the extrinsic evidence, including the Service Agreement, contradicted the decision reached by Endurance. Endurance's analysis under the Shearer exception is deeply flawed, and its denial of a defense based upon its "questionable interpretation of law" constitutes bad faith as a matter of law. See Am. Best Food, 168 Wn.2d at 413.

In addition, Endurance's post hoc invocation of Oregon law lacks merit. Alaska Airlines tendered the Kekona Claim and Kekona Lawsuit to Endurance under *both* the Service Agreement and the Endurance Policy, and the Endurance Policy did not contain a choice-of-law provision. Given that the Endurance Policy had no choice-of-law

provision and that the Kekona Lawsuit was filed in Washington, any decision to ignore Washington law in denying a defense to Alaska Airlines was unreasonable as a matter of law.[8]

Alaska Airlines also contends that Endurance's breach of its duty to defend was unreasonable considering Endurance's decision to defend Huntleigh without reservation. The Court agrees. The Endurance Policy required Endurance to "pay those sums that the insured becomes legally obligated to pay as damages because of **bodily injury** or **property damage** to which this insurance applies resulting from [Huntleigh's] **aviation operations**." Endurance Policy (docket no. 28 at 59). Similarly, the Service Agreement provided that Huntleigh would defend and indemnify Alaska Airlines for any death or injury to any person arising out of or resulting from any acts or omissions of Huntleigh. See Ex. 1 to Fetters Decl. (docket no. 39-1 at 3) (citing Service Agreement § 6). The Court has difficulty imagining how the Kekona Claim and/or Kekona Lawsuit triggered Endurance's duty to defend Huntleigh, but not Alaska Airlines. The duty to defend Huntleigh was triggered by the same allegations made against Alaska Airlines, namely that a bodily injury resulted from Huntleigh's operations, and that Huntleigh had acted as an agent of Alaska Airlines. By agreeing to defend Huntleigh without reservation,

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[8] The expert report submitted by Endurance does not create an issue of fact on whether it acted in bad faith. Although the declaration accompanying the report states that Endurance's denial of the tenders "was based upon its view of the applicable law, and its understanding of the facts and circumstances of the case," it does not address whether these interpretations of the law and facts were reasonable. McSwain Decl. at ¶ 7 (docket no. 68). The expert report further describes as "noteworthy" that the arbitrator used "multiple pages of reasoning" when determining that Shearer was inapplicable to this case. Ex. 1 to McSwain Decl. (docket no. 68-1 at 8). This observation is entirely irrelevant.

Endurance acknowledged that the Kekona Complaint alleged that Kekona's injuries and death were caused by the acts or omissions of Huntleigh, and therefore Endurance's failure to also provide a defense to Alaska Airlines was unreasonable.

The duty to defend Alaska Airlines was triggered, not only by the various tender letters, but also by Kekona's demand for mediation, which qualified as a "suit." The Endurance Policy applied to "any suit" seeking damages because of bodily injury or property damage to which the Endurance Policy applied. Endurance Policy (docket no. 28 at 64). The Endurance Policy defined "suit" to include arbitration proceedings and any other alternative dispute resolution proceedings to which the insured submits with Endurance's consent. Id. at 74. As a result, Kekona's mediation demand also triggered the duty to defend.[9] The denial letter issued in September 2017, in response to USAIG's August 2017 tender and Kekona's mediation demand, breached Endurance's duty to defend, and each of the tender denials thereafter constituted an additional breach of Endurance's duty to defend.

"Bad faith is typically a question of fact, but summary judgment is appropriate when 'reasonable minds could not differ' that the refusal to defend was unreasonable." Osborne Constr. Co. v. Zurich Am. Ins. Co., 356 F. Supp. 3d 1085, 1096 (W.D. Wash. 2018) (quoting Smith v. Safeco Ins. Co., 150 Wn.2d 478, 486, 78 P.3d 1274 (2003)). Reasonable minds cannot differ in this case. Endurance put its own interests ahead of

[9] Although Endurance now asserts that it never consented to the mediation with Kekona, Kern Wooley indicated on Sompo's and Endurance's behalf that they "would not be opposed to an agreement to mediate." Ex. 4 to Fetters Decl. (docket no. 39-1 at 36).

those of Alaska Airlines, which was one of its insureds, failed to give the benefit of any doubt to this insured, and did not avail itself of legal options such as proceeding under a reservation of rights or seeking declaratory relief. The Court concludes that Endurance's breach of its duty to defend was in bad faith as a matter of law.[10]

III. Presumption of Harm

An insurer that, in bad faith, refuses or fails to defend is estopped from denying coverage. Truck Ins., 147 Wn.2d at 759. To prevail on a bad faith claim and obtain the estoppel remedy, the insured must prove harm. See Safeco Ins. Co. of Am. v. Butler, 118 Wn.2d 383, 389, 823 P.2d 499 (1992). Alaska Airlines contends that it is entitled to a presumption of harm. Under Washington law, an insurer's bad faith breach of contract gives rise to a rebuttable presumption of harm. Kirk v. Mt. Airy Ins. Co., 134 Wn.2d 558, 562, 951 P.2d 1124 (1998). The insurer can rebut the presumption by showing by a preponderance of the evidence that its acts did not prejudice the insured. Mut. of Enumclaw Ins. Co. v. Dan Paulson Constr., Inc., 161 Wn.2d 903, 920, 169 P.3d 1 (2007).

[10] Because the Court determines that Endurance's breach of the duty to defend was unreasonable and therefore constituted bad faith as a matter of law, the Court also concludes that Endurance violated IFCA. See RCW 48.30.015(1) (creating a cause of action against insurers who unreasonably deny coverage or benefits). Endurance argues that Alaska Airlines' IFCA claim must be dismissed because it cannot prove actual damages. See id. ("Any first party claimant to a policy of insurance who is unreasonably denied a claim for coverage or payment of benefits by an insurer may bring an action . . . to recover the actual damages sustained."). As addressed below, Endurance's argument fails because Alaska Airlines seeks actual damages proximately caused by Endurance's bad faith denial of a defense, such as premium-related damages and the costs and fees associated with pre-suit arbitration. IFCA also gives courts the discretion to "increase the total award of damages to an amount not to exceed three times the actual damages." RCW 48.30.015(2). The amount of damages, and whether Endurance is liable for treble damages, must await further proceedings.

Here, because Endurance's breach was in bad faith, Alaska Airlines is entitled to a presumption of harm. Although Endurance bears the burden of showing that its breach of its duty to defend did not harm Alaska Airlines, Alaska Airlines has put forth several theories of harm. Specifically, Alaska Airlines asserts that it was harmed due to increase in its insurance premiums, the fees and costs incurred in the arbitration with Huntleigh, and "other costs associated with Alaska Airlines having to manage the litigation." Reply at 11 (docket no. 72). The thrust of Endurance's response is that Alaska Airlines cannot prove harm because the defense of the Kekona Lawsuit was fully funded by another insurer. In support of this argument, Endurance relies on Ledcor Industries (USA), Inc. v. Mutual of Enumclaw Insurance Co., 150 Wn. App. 1, 206 P.3d 1255 (2009). In Ledcor, the Washington Court of Appeals affirmed a trial court's finding that an insurer had successfully rebutted the presumption. Id. at 11. According to the Ledcor Court, the facts established that the insured "ultimately received what the policy entitled it to, and therefore suffered no harm due to [the insurer's] failure to timely accept tender and defend." Id. Because the insured suffered no harm, the trial court did not err in awarding no damages for bad faith. Id.

Endurance's reliance on the Ledcor decision is misplaced. First, the bad faith determination in this case places the burden to rebut the presumption of harm on Endurance. Endurance "cannot evade or sustain its burden of proof by arguing that the *insured* has not made a showing that [it] *did* suffer harm." See Specialty Surplus Ins. Co. v. Second Chance, Inc., 412 F. Supp. 2d 1152, 1163 (W.D. Wash. 2006). Second, even assuming Endurance is correct that Alaska Airlines cannot show damages related to the

costs of defending the Kekona Lawsuit, Alaska Airlines has asserted other theories of harm. Regarding the costs caused by the arbitration with Huntleigh, Endurance argues that Alaska Airlines cannot point to any provision of the Endurance Policy that would entitle it to fees and costs associated with pursuing a claim against Huntleigh. Resp. at 17 (docket no. 66). This assertion misses the point. Alaska Airlines seeks recovery of these fees as tort damages proximately caused by Endurance's bad faith denial of a defense. Whether these fees would be recoverable under the Endurance Policy is irrelevant. The Court concludes that Endurance has failed, as a matter of law, to rebut the presumption of harm.[11] Accordingly, the Court concludes that Alaska Airlines has proven its bad faith claim, and that coverage by estoppel is appropriate in this case. See Safeco, 118 Wn.2d at 394.

IV. Consumer Protection Act

In connection with its CPA claim, Alaska Airlines has clarified that the sole relief it seeks in this motion for partial summary judgment is "an order that Endurance's denial of coverage was unreasonable, unfair, and deceptive." Reply at 13 (docket no. 72). The CPA makes unlawful "[u]nfair methods of competition and unfair or deceptive acts or

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[11] To be clear, the Court's ruling is based solely on the fees and costs related to the arbitration with Huntleigh. The question of whether Alaska Airlines suffered other harms, for example, increased insurance premiums, which Endurance has failed to rebut involves genuine disputes of material fact. Endurance argues that Alaska Airlines' increased-premiums theory is "speculative at best." Resp. at 21 (docket no. 66). In an attempt to rebut this claim, Endurance submits testimony from its expert that the $5.1 million claim on the loss run of Alaska Airlines would exist regardless of whether Endurance had provided the defense and paid the judgment. McSwain Decl. at ¶ 14 (docket no. 68). Alaska Airlines disputes this opinion, asserting that had Endurance provided a defense, the losses from the Kekona Lawsuit would not be reflected in the loss runs of its aviation insurers. See Beyer Decl. at ¶ 8 (docket no. 77). This issue must await trial.

practices in the conduct of any trade or commerce." RCW 19.86.020. To prevail on a private CPA claim, a plaintiff must prove (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) affecting the public interest, (4) an injury to the plaintiff's business or property, and (5) causation. Panag v. Farmers Ins. Co. of Wash., 166 Wn.2d 27, 37, 204 P.3d 885 (2009) (citing Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 784, 719 P.2d 531 (1986)). Whether a certain act or practice is "unfair or deceptive" is a question of law. Id. at 47.

A violation of RCW 48.30.010, which prohibits insurers from engaging in unfair or deceptive acts or practices as defined by the insurance commissioner, constitutes a per se unfair or deceptive act or practice for purposes of the CPA. Van Noy v. State Farm Mut. Auto. Ins. Co., 98 Wn. App. 487, 496, 983 P.2d 1129 (1999). A violation of any of the provisions of WAC 284-30-330 or WAC 284-30-350 is violation of RCW 48.30.010 and satisfies the first element of a CPA claim. Id. Alaska Airlines contends that Endurance violated WAC 284-30-330(13), which defines as an unfair or deceptive act or practice "[f]ailing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement." Alaska Airlines further contends that Endurance violated WAC 284-30-350(1), which provides that "[n]o insurer shall fail to fully disclose to the first party claimants all pertinent benefits, coverages or other provisions of an insurance policy or insurance contract under which a claim is presented."

In response, Endurance contends that its "technical" violations of these WAC provisions are not actionable because its conduct was reasonable. Resp. at 22–23 (docket

no. 66). Although a reasonable basis for denial of an insured's claim would be a complete defense to any claim that an insurer violated the CPA, see Dombrosky, 84 Wn. App. at 260, the Court has concluded that Endurance's breach of its duty to defend was unreasonable. Accordingly, the Court concludes that Endurance committed an unfair or deceptive act or practice under the CPA.

V. David Beyer's Testimony

Endurance moves to preclude David Beyer, Director of Risk Management for Alaska Airlines, from offering his opinion concerning the quantification of insurance premium damages. As the party offering the expert testimony, Alaska Airlines bears the burden of establishing the admissibility of Beyer's testimony by a preponderance of the evidence. See Bldg. Indus. Ass'n of Wash. v. Wash. State Bldg. Code Council, 683 F.3d 1144, 1154 (9th Cir. 2012). "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if" (i) "the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue," (ii) "the testimony is based on sufficient facts or data," (iii) "the testimony is the product of reliable principles and methods," and (iv) "the expert has reliably applied the principles and methods to the facts of the case." Fed. R. Evid. 702(a)–(d). Rule 702 is liberally construed in favor of admissibility. See Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 588 (1993).

The trial judge is tasked with ensuring "that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." Id. at 597. In determining whether expert testimony is reliable, the Court may consider certain factors, such as

testing, peer review, error rates, and acceptability in the relevant scientific community. See id. at 593–94. But "the test of reliability is 'flexible,' and Daubert's list of specific factors neither necessarily nor exclusively applies to all experts or in every case." Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 141 (1999). Courts, however, must take care "to assure that a proffered witness truly qualifies as an expert, and that such testimony meets the requirements of Rule 702." Jinro Am. Inc. v. Secure Invs., Inc., 266 F.3d 993, 1004 (9th Cir. 2001).

On February 28, 2022, Alaska Airlines disclosed Beyer's anticipated testimony. See Ex. A to Neal Decl. (docket no. 84). Beyer is expected to testify concerning his calculation of increased insurance premiums. Id. In his capacity as Director of Risk Management for Alaska Airlines, Beyer is responsible for "procurement of a wide variety of insurance products covering the vast array of liability and property exposures associated with the operations" of Alaska Airlines and its subsidiaries. Beyer Decl. at ¶ 3 (docket no. 40). Based upon his years of experience in negotiating and procuring insurance for Alaska Airlines, he considers himself a "sophisticated consumer of aviation insurance." Id. at ¶ 7. Using "historical, financial" data, Beyer has estimated the increase in premiums Alaska Airlines has paid, and is likely to pay in the future, based on the presence of the Kekona Lawsuit on its loss run from 2017 through 2027. Beyer Decl. at ¶ 4 (docket no. 91); see also Beyer Decl. at ¶ 4 (docket no. 77) (explaining that the Kekona Lawsuit will no longer appear on Alaska Airlines' loss run after 2027). According to Beyer, when calculating an aviation insurance premium, the total number of claims on an airline's loss run is not relevant. Beyer Decl. at ¶ 11 (docket no. 77).

Instead, "it is the cumulative annual average of settlements, judgments, and claims expenses over the 10-year loss history that matters." Id. Thus, to quantify the impact of the Kekona action, Beyer looked to the amount the Kekona action increased that average on a yearly basis. Id.; Beyer Decl. at ¶ 11 (docket no. 91). Using this methodology, Beyer calculated that Alaska Airlines will suffer over $5 million in total damages as a result of the Kekona action appearing on its loss run. See Ex. A to Beyer Decl. (docket no. 92) (filed under seal); Beyer Decl. at ¶ 6 (docket no. 77); Beyer Decl. at ¶¶ 14–17 (docket no. 91).

As an initial matter, Endurance argues that Beyer's expert disclosure does not comply with Rule 26(a)(2)(C). Pursuant to Rule 26(a)(2)(C), disclosures from witnesses who are not required to provide a written report must state the subject matter on which the witness is expected to present evidence and a summary of facts and opinions about which the witness is expected to testify. Endurance argues that Alaska Airlines' Rule 26(a)(2)(C) disclosure fails to provide an adequate summary of the opinions and facts concerning which Beyer will testify. Endurance, however, does nothing more than recite the requirements for disclosures under Rule 26(a)(2)(C). It does not explain how Alaska Airlines' disclosure is inadequate. Even if the Court accepts Endurance's argument that Alaska Airlines' disclosure is somehow deficient, the alleged deficiency is harmless in light of the fact that Endurance has deposed Beyer on multiple occasions, including in his capacity as an expert on March 31, 2022. See Beyer Dep. (docket no. 86).

Endurance also contends that Beyer's anticipated testimony should be excluded under Rule 702 and Daubert because it is unreliable. Endurance argues that Beyer's methodology (i) lacks peer review, (ii) is unsupported, (iii) excludes claim-specific information, other major losses, publicly available data on the broader aviation insurance market, and post-COVID trends in the aviation market, and (iv) ignores the subjective nature of aviation insurance negotiations. Mot. to Exclude at 4–9 (docket no. 83). Beyer does not dispute that he has never seen any underwriter, agent, or broker use his methodology to quantify a specific claim's purported effect on an insurance premium. Beyer Dep. at 24:2–11 (docket no. 86). Similarly, Beyer does not dispute that his methodology is not peer-reviewed. Id. at 24:24–25:3. But neither of these factors is dispositive. The test of reliability is flexible, Kumho Tire, 526 U.S. at 141, and Endurance ignores that Beyer's anticipated testimony is based on his knowledge of, and experience in, the aviation insurance marketplace. Although Beyer's precise methodology has not been peer reviewed, it is not particularly complex. See Beyer Decl. at ¶¶ 12–13 (docket no. 91) (applying his methodology to the 2017–2018 Renewal Policy Year); see also Primiano v. Cook, 598 F.3d 558, 565 (9th Cir. 2010) ("Peer reviewed scientific literature may be unavailable because the issue may be too particular, new, or of insufficiently broad interest, to be in the literature."). Further, Beyer contends that his methodology is supported by what is common knowledge in the industry, namely that claims drive premium costs. Beyer Dep. at 24:12–23.

The Court concludes that Endurance's challenges go to the weight, not the admissibility, of Beyer's testimony. See City of Pomona v. SQM N. Am. Corp., 750

F.3d 1036, 1044 (9th Cir. 2014) ("Challenges that go to the weight of the evidence are within the province of a fact finder, not a trial court judge."). Endurance's view that Beyer's opinion is unreliable because he failed to consider a variety of factors may be explored during cross-examination at trial. Alaska Airlines has demonstrated, by a preponderance of the evidence, that Beyer's anticipated testimony is sufficiently reliable and relevant, and that it will assist the trier of fact in understanding the evidence. Therefore, Endurance's motion to exclude the testimony of Beyer, docket no. 83, is DENIED.[12]

Conclusion

For the foregoing reasons, the Court ORDERS:

(1) Alaska Airlines' Motion for Partial Summary Judgment, docket no. 45, is GRANTED. The Court concludes that Endurance's breach of its duty to defend was unreasonable and therefore constitutes bad faith as a matter of law. Endurance has not rebutted the related presumption of harm, and coverage by estoppel is an appropriate remedy for Endurance's bad faith. Endurance's bad faith also establishes its liability under IFCA, but the Court makes no ruling concerning damages. Further, the Court

[12] In light of this ruling on Endurance's motion to exclude Beyer's testimony, Endurance's motion, docket no. 78, to strike the Declaration of David Beyer, docket no. 77, is STRICKEN as moot. Endurance's motion to strike Beyer's declaration presents the same arguments as its motion to exclude Beyer's testimony, specifically, that Beyer's expert disclosure does not comply with Rule 26(a)(2)(C) and his testimony is unreliable. Additionally, Endurance's motion, docket no. 96, to strike the Declaration of David Beyer, docket no. 91, is DENIED. Contrary to Endurance's assertion, the declaration does not present any new or different opinions. See Alaska Airlines' Rule 30(b)(6) Dep. at 250:12–17, Ex. 1 to Weber Decl. (docket no. 100); Ex. A to Beyer Decl. (docket no. 92) (filed under seal).

concludes, as a matter of law, that Endurance committed an unfair or deceptive act or practice under the CPA.

(2) Endurance's Cross-Motion for Partial Summary Judgment, docket no. 65, is DENIED.

(3) Endurance's motion to exclude the testimony of David Beyer, docket no. 83, is DENIED.

(4) Endurance's motion, docket no. 78, to strike the Declaration of David Beyer, docket no. 77, is STRICKEN as moot, and its motion, docket no. 96, to strike the Declaration of David Beyer, docket no. 91, is DENIED.

(5) The Clerk is directed to send a copy of this Order to all counsel of record.

IT IS SO ORDERED.

Dated this 28th day of July, 2022.

Thomas S. Zilly
United States District Judge